Supreme Court of the United States

OCTOBER TERM, 1940.

No. 605.

JACKSON COUNTY, MISSOURI, PETITIONER,

VS.

CLARENCE B. REED, TRUSTEE, RESPONDENT.

To the Honorable Charles Evans Hughes, Chief Justice of the United States Supreme Court, and the Associate Justices of the United States Supreme Court.

MOTION AND BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI.

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To the Honorable Charles Evans Hughes, Chief Justice of the United States Supreme Court, and the Associate Justices of the United States Supreme Court.

MOTION AND BRIEF OF RESPONDENT OPPOSING WRIT OF CERTIORARI.

Your respondent respectfully moves that the application of the petitioner for a writ of certiorari be denied because said application is devoid of merit and there is involved in this case no federal question reviewable by the Supreme Court of the United States.

In support of said motion, your respondent, Clarence B. Reed, trustee, respectfully shows:

I.

Supplemental Statement of Respondent of the Matter Involved.

The record of the case conclusively shows that it was tried and submitted by the parties in both the trial

court and in the Supreme Court of Missouri on the theory that Section 11834, Revised Statutes of Missouri, 1929, is applicable and the controlling statute. The record of the case discloses that respondent's petitions alleged that Jackson County contained "more than 150,000 inhabitants and less than 500,000 inhabitants" (R. 426), which, in effect, invoked Section 11834, Revised Statutes of Missouri, 1929, the statute applicable to such counties. While petitioner's several answers contained general denials (R. 23, 30, 35), these denials, in so far as the applicability of Section 11834, Revised Statutes of Missouri, 1929, was concerned, were waived and abandoned throughout the trial.

In cross examination of respondent's witnesses (R. 94, 95, 96, 100, 111, 114, 136, 139, 140, 148, 149-50, 161, 166, 176, 177, 178, 179, 181, 183, 191, 192) and in direct examination of his own witnesses (R. 212, 223, 224) petitioner's counsel repeatedly referred to the classification of deputies (into Classes A, B, C and D) provided for in that section, and in that section only, as applicable to the case on trial.

At one place in his cross examination of a witness, counsel made the express statement that it "is the law of this state that a Class D deputy draws $6 per day" (R. 94) which was conclusive admission that Section 11834 is applicable, in as much as no other section of the statute so provides.

In cross examining as to the number of Class C deputies, counsel referred to the "legal status" of Class C deputies (R. 96-97)—obviously meaning their legal status under Section 11834, which is the only section referring to Class C deputies.

At other places in the record counsel referred to the claim in the suit as being "based on a certain section of the statute" (R. 109), and referred to a certain witness "basing your claim on that same statute" (R. 136) —obviously meaning Section 11834, since no other section was ever mentioned.

The applicability of Section 11834 was also conceded by petitioner in the offering of its proof. The testimony of Senator Harry S. Truman, former presiding judge of the county court, offered by petitioner leaves no doubt that the county court treated Section 11834 as the applicable statute (R. 221-2). We quote these significant parts of Senator Truman's testimony (R. 221-2):

> "I was presiding judge of the County Court of Jackson County, Missouri, in 1930, '31, '32 and '33 and during all of those years from 1927 to 1934. I knew Mr. English who was assessor from June, 1929, for four years thereafter, very well; I know him yet. I had conversations with him in 1930 concerning the money available for his department for the year 1931. * * * I know Mr. W. F. Cook very well; chief deputy for Mr. English. * * * Mr. Cook and Mr. English came to the county court and said that if they were allowed to put their deputies on a day basis or a per diem basis, which the law allowed, that they would rather be allocated a certain amount of money for the purpose of operating their office rather than have the number of deputies specified as specific, as a part of the law provided. * * * In other words, have a larger number of 'D' deputies instead of having a group of A, B, C and D deputies, as the law provided; * * *"

This clearly and conclusively shows that Senator Truman and the other members of the county court, as well as the assessor and his chief deputy, treated Section 11834 as applicable, in as much as no other section contained the provisions referred to by Senator Truman in his testimony.

The several pay-roll records (R. 238-9) and orders (R. 230, 232, 234) of the county court, offered by petitioner, refer to the classifications of deputies provided for in Section 11834 and clearly show on their face that the county court treated Section 11834 as applicable.

After the opinion of Division Number One of the Supreme Court of Missouri was filed herein, petitioner filed its motion for rehearing and lengthy supporting

suggestions in which it still treated Section 11384 as applicable, and made no suggestions to the contrary. After the motion for a rehearing was overruled, the petitioner filed its motion to transfer the cause from Division Number One to the court *en banc*. This motion contained no challenge whatever as to the applicability of Section 11834. The applicability of said section was first challenged by *amici curiae*, purporting to represent certain quasi-political and civic organizations of Kansas City, in their suggestions in support of petitioner's motion to transfer the cause from Division Number One of the Supreme Court of Missouri to the court *en banc*.

On September 4, 1940, the Supreme Court of Missouri, after having had called to its attention Section 11808, Revised Statutes of Missouri, 1929, by the said *amici curiae* vigorously contending that said section was applicable and controlling, overruled the petitioner's motion to transfer. Thereafter, on the 11th day of September, the petitioner filed in the Supreme Court of Missouri a motion to stay mandate in which it prayed the "court for a period of ninety (90) days to afford it an opportunity to make application for said writ of certiorari." On the same day, the respondent filed, in the Supreme Court of Missouri, suggestions in opposition to motion to stay mandate and, among other statements, it recited "the motion to stay the mandate is dilatory and vexatious, and apparently is filed only for the purpose of harassing, annoying and delaying the plaintiff in error." The petitioner took no steps in the matter of applying for a writ of certiorari until November 30, 1940, upon which date it requested and obtained from the clerk of the Supreme Court of Missouri, certified copies and transcript of the record. The ninety-day period, for which the mandate was stayed, expired on December 3, 1940. Thus counsel for petitioner trifled with the Supreme Court of Missouri in a species of sharp practice.

GROUNDS RELIED ON FOR DENIAL OF THE WRIT.

I.

The petition is devoid of merit because there is involved in this case no federal question, reviewable by the Supreme Court of the United States.

II.

This cause was tried and decided in the trial court, submitted and decided in Division Number One of the Supreme Court of Missouri, upon the admitted theory that Section 11834, Revised Statutes of Missouri, 1929, is applicable. It cannot now, therefore, be heard, considered or decided by any court on any other theory.

III.

Section 11808, Revised Statutes of Missouri, 1929, is not applicable and does not control the rights of the respondent.

IV.

The record contains evidence that the petitioner's application is dilatory and vexatious, and not predicated on meritorious considerations.

ARGUMENT.

I.

This cause presents no complicated facts. Reduced to the briefest statement, it is a suit to recover the balance due on official salaries. The schedule of said salaries is explicitly set forth in Section 11834, Revised Statutes of Missouri, 1929. The Supreme Court of Missouri sustained the contention of the respondent on the ground that it would be against public policy and the welfare of the state to deny to any official the full compensation for his services as fixed by law. This decision accords with the majority rule in the United States, hence there is nothing revolutionary in the decision of the Supreme Court of Missouri. From this, it appears that there is no federal question involved. Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. Whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern. *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. 817.

As stated by Mr. Justice Field in *Baltimore & Ohio R. R.* v. *Baugh*, 149 U. S. 368, 401, 13 S. Ct. 914-937:

> "There stands as a perpetual protest against its repetition the Constitution of the United States which recognizes and preserves the autonomy and independence of the states—independence in their legislative and independence in their judicial departments."

Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, 370-372, 30 S. Ct. 140:

> "But the law, in the sense in which courts speak of it today, does not exist without some definite au-

thority behind it. * * * The authority and only authority is the state and, if that be so, the voice adopted by the state as its own (whether it be of its legislature or of its Supreme Court) should utter the last word."

In the light of the foregoing, the petitioner cannot successfully invoke either the Fifth or Fourteenth Amendments of the Constitution of the United States. The record discloses that the petitioner enjoyed "due process of law." Three times, the Supreme Court of Missouri, first, in announcing its decision; second, in overruling petitioner's motion for a rehearing; and, third, in overruling petitioner's motion to transfer it, accorded to the petitioner the benefit of "due process of law."

II.

The courts of Missouri have uniformly held that, when a case is tried and submited on one theory, it cannot be tried on appeal on a different theory.

The decision in *Engle* v. *Worth County,* 213 S. W. 70, 72, is direct in point. In that opinion Judge Graves said:

> "In respondent's (Worth County) brief there is a suggestion that the land is not subject to partition because of it being the homestead of Mary C. Walton, the widow. Whether there is substance in this contention need not be decided. Worth County is in no position to urge the question here. This because such was not the theory in the trial below. By answer, Worth County joined in the request for the partition and sale, and asked that her deed of trust be declared a first lien upon the proceeds of sale. The whole proceeding below was not one adverse to the idea of partition. On the contrary, the trial was on the theory that partition was proper, but that it could not be had in kind (owing to the number of interests), and a sale in partition should be ordered. It is trite law that the theory *nisi* cannot be shifted here upon appeal."

In *Sturtevant Co.* v. *Ford Manufacturing Co.*, 315 Mo. 1025, 1043-4, the respondent (plaintiff), having tried the case on one theory, attempted to shift its theory on appeal. This court refused to permit the shift, and said:

> "It has repeatedly been announced by this court that parties are bound on appeal by the theory of recovery adopted by the parties and by the court in the trial below (*Hill* v. *Drug Co.*, 140 Mo. 433; *Taylor & Sons Brick Co.* v. *Railway Co.*, 243 Mo. 715; *Degonia* v. *Railway Co.*, 224 Mo. 564)."

In *Snyder* v. *American Car & Foundry Co.*, 322 Mo. 147, 156, 14 S. W. 2d 603, this court said:

> "It is elementary that a cause must be heard in the appellate court upon the same theory as that upon which it was tried (*Guthrie* v. *Gillespie*, (Mo. Sup.) 6 S. W. 2d 886; *Plenieng* v. *Wells*, (Mo. Sup.) 271 S. W. 62; *Kane* v. *McMenamy*, 307 Mo. 98, 270 S. W. 662; *St. Louis* v. *Wright Contracting Co.*, 210 Mo. 491, 109 S. W. 6)."

In *Taylor & Sons Brick Co.* v. *Kansas City Southern Railway Co.*, 213 Mo. 715, 727, this court said:

> "It has repeatedly been announced by this court that the case reviewed by the appellate court will be reviewed upon the theory adopted by the parties in the trial of the cause, and, as was said by this court in *Hill* v. *Drug Co.*, 140 Mo. l. c. 439, 'It can now be announced as the fixed policy of our practice that parties litigant will be confined to the course of action they have adopted throughout the progress of the trial, even though that action be inconsistent with the course to have been pursued as indicated by the pleadings on file.' "

In *St. Louis* v. *Wright Contracting Co.*, 210 Mo. 491, 502, the respondent (plaintiff) tried the case on a certain theory, and in this court attempted to change that theory. But this court said:

> "It is well settled that a cause must be heard in the appellate court upon the same theory as that upon which it was tried in the trial court (*Walker*

v. *Owen*, 79 Mo. 563; *Minton* v. *Steele*, 125 Mo. 181; *Dice* v. *Hamilton*, 178 Mo. 81; *Meyer Bros. Drug Co.* v. *Bybee*, 179 Mo. 354). And it may be said that no other theory is possible."

III.

Section 11808 was first enacted in 1887 as a general statute pertaining to the salaries of county officials and setting up the method of determining their compensation upon the basis of population, calculated according to arbitrary rule and not upon official census. Section 11834 was not enacted until 1893 and applied only to Jackson County and counties of its population class. The legislature had the power to repeal Section 11808 in so far as it applied to Jackson County, both as to establishing a fixed schedule of salaries to be paid deputies and determining the population upon the basis of official census. In placing these two sections in parallel columns, this was plainly the intent of the legislature. The fact that Jackson County was at that time becoming a populous community requiring a larger number of deputies to discharge the duties of the several county offices than was required in the average county was sufficient justification for amending Section 11808 by Section 11834 which the legislature plainly intended to do.

The legislature subsequent to 1887 enacted Articles 4, 5 and 6 applying to Buchanan, Green, Jasper and St. Louis Counties, respectively. The enactment of these special acts contained in Articles 4, 5 and 6 of Chapter 84 clearly discloses the adoption of a definite policy by the legislature with reference to the more populous counties. Section 11834, therefore, is not a stray statute, irreconcilable with Section 11808, but is in complete harmony with it and is one of a series of enactments by the legislature showing a definite policy to remove the more populous counties from the provisions of Section 11808. There is nothing in our statutes, we submit, which seems more patent than this fact.

If Section 11808 applies to Jackson County (respondent), then of necessity, by the same argument, it also applies with equal force to Articles 4, 5 and 6, Chapter 84, which govern the salaries of officials and deputies in Buchanan, Green, Jasper and St. Louis Counties, respectively. There is no escape from this reasoning. If, therefore, Section 11808 is the controlling statute both as to salaries of deputies and the artificial method of calculating population, for the purpose of determining their compensation, the plain intent of the legislature would not only be thwarted, but indescribable confusion and chaos would ensue. For example, the populations of Buchanan, Green and Jasper Counties would be elevated to the higher bracket of population applicable to Jackson County and Jackson County, according to this method of calculation, if Section 11808 applies, would be relegated to the class of less populous counties of the state with respect to the matter of salaries of county officials and their deputies. Because there is no county in the state that has a fictitious population of more than one million persons. Certainly, this court is not called upon to construe a statute in such an unreasonable way that it would result in a hopeless jumble and a mockery of the law.

IV.

The record discloses that the course of the petitioner in this case has been contradictory and inconsistent. So much so that it arouses the suspicion that the petitioner's defense is not buttressed by merit, but predicated rather upon vexation and delay. In the petitioner's application, filed with the Supreme Court of Missouri, for a stay of the mandate for ninety days, it evidently led the court into the belief that the petitioner would act with due diligence in pressing its application for a writ of certiorari, and probably obtaining a decision of the Supreme Court of the United States, thereon, within the ninety-day grace allowed. Otherwise, the court would either have allowed

a longer period, or would have denied the motion. The petitioner did not act with due diligence. It did not call upon the clerk of the Supreme Court of Missouri for a certified copy of the record until November 30th—three days before the expiration of the ninety-day period. The petitioner not only failed to keep faith with the Supreme Court of Missouri, but it has violated the rights of the respondent by its dilatory tactics.

Again, after petitioner's motion for rehearing in the Supreme Court of Missouri had been denied by that body, it filed a formal motion to transfer the cause from Division Number One, presided over by four of the seven judges of the Supreme Court of Missouri, and who had unanimously determined the issues in the favor of the respondent. In other words, if the cause had been transferred to the court *en banc*, a majority of that body would have decided the issues in favor of the respondent, unless one or more of the four judges of Division Number One had chosen to reverse their decision.

The petitioner, being bound by its various admissions contained in pleadings and in open statements in the trial court and arguments of its briefs that Section 11834, Revised Statutes of Missouri, 1929, was applicable and the controlling statute, was prevented from advancing the theory that Section 11808, Revised Statutes of Missouri, 1929, was the controlling statute. This situation was relieved by the appearance in the case of divers *amici curiae*, purporting to represent certain quasi-political and civic organizations of Kansas City, Missouri, for the first time in the course of the litigation, Section 11808 was invoked. It had never been previously referred to, directly or indirectly. In passing upon petitioner's application, the dilatory tactics, inconsistencies and contradictions of the petitioner and its counsel should be given due consideration.

Conclusion.

Petitioner's application for a writ of certiorari should be denied:

(a) There is no federal question involved, reviewable by the Supreme Court of the United States, and the petitioner has been accorded the full benefit of "due process of law."

(b) Supreme Court of Missouri correctly held that Section 11834, Revised Statutes of Missouri, 1929, was applicable and the controlling statute.

(c) Evidence contained in the record indicates that the defense of the petitioner is based upon vexation and delay, and not predicated upon merit.

Respectfully submitted,

DAVID M. PROCTOR,
Attorney for Respondent, Clarence B. Reed, Trustee.